

**STATEMENT of**  
**Levi Pesata, President of the Jicarilla Apache Nation**  
**Before the**  
**SECRETARIAL COMMISSION ON INDIAN TRUST ADMINISTRATION**  
**AND REFORM**  
**June 11-12, 2012**

**INTRODUCTION**

- Good afternoon
- I'm Levi Pesata, President of the Jicarilla Apache Nation.
- Thank you for holding this important meeting to solicit input from Indian Tribes regarding the Department of the Interior's administration and management of Indian trust assets and how the Department can improve the way its carrying out its trust responsibilities to Tribes and Indian people.
- My remarks will focus on our experience in attempting to hold the Federal Government accountable for its Trust Responsibility to our Tribe.

**BREACH OF TRUST CASE - "FIDUCIARY EXCEPTION"**

- In 2002, we sued the Federal Government for breach of its trust responsibilities in managing and overseeing our trust funds and assets.
- In the course of the case, the Government withheld certain documents from discovery based on the attorney-client privilege. We filed a motion to compel the Government to produce those documents based on the "fiduciary exception," a longstanding legal rule which permits a private trust beneficiary to see communications between its trustee and an attorney regarding management of its trust assets.
- We won in the trial court and the Federal Circuit Court of Appeals. Both ruled that the "fiduciary exception" applies to the Federal Government in its capacity as trustee for Indian trust assets. The Government appealed to the Supreme Court. Unfortunately, the Supreme Court ruled against us.
- The Supreme Court decided that the Federal Government can withhold documents that a private trustee cannot, essentially ruling that Indians have less rights than private trust

beneficiaries to obtain information about how trust assets have been managed by the trustee. In short, it made Indians second-class beneficiaries.

- At the oral argument before the Supreme Court, the Assistant Solicitor General representing the Administration denied that the Federal Government has a trust responsibility to the Jicarilla Apache Nation. This was a shocking and disappointing statement, especially from an Administration that has made key progress in improving the Federal and Tribal government-to-government relationship.
- The Federal Government should not be allowed to run and hide from its Trust Responsibility, especially in the context of litigation.
- Our breach of trust case has been pending for over a decade, and has cost us a significant amount of money, including funds spent on litigating our right to discover documents regarding the management of our trust assets. These funds could have been spent on providing essential health care, education and other critical services to our tribal members.
- Ultimately, our trustee dragged us to the Supreme Court to avoid and deny its trust responsibility to our Tribe. Unfortunately, the Supreme Court's ruling not only applies to our Tribe but to all other Tribes. This is a very damaging ruling which diminishes the Trust Relationship. Congress should correct it. In my written statement, we propose a statutory "fix" to address this problem.
- We respectfully request the Commission to embrace our recommendation and forward it to the Secretary as an important and meaningful component of trust reform.

## **LAND & NATURAL RESOURCES PROTECTION**

### ***Introduction***

- For decades, our Tribe has actively worked to make sure the Federal Government fulfills its trust responsibilities to manage and maximize the value of our natural resources.
- In the leasing of tribal trust minerals, Federal laws and regulations require the Secretary of the Interior to act in the best interest of the Indian tribal mineral owner and to "maximize tribal revenues."
- Through these laws, Congress created an enforceable fiduciary or Trust Relationship, where the government acts as a trustee for the Tribes in the leasing of tribal trust resources.

- This is critically important because we rely heavily on our oil & gas resources to provide essential services to our Tribal members and to those living near or travelling through our Reservation. Our oil & gas resources are non-renewable, so once extracted they are gone.

### ***Lawsuits Against the Trustee***

- Unfortunately, we have had to sue our trustee to protect the value of our resources. We won a key ruling in the Federal Courts requiring the Secretary to exercise his trust duties and require lessees to properly compute and pay royalties on our oil and gas resources.
- By compelling the Government to fulfill its trust responsibility to us, we have successfully collected substantial funds that should have been paid to us in the first instance.
- We still have several pending royalty valuation cases against the Secretary that go back several decades. This effort has cost us a significant amount of funding; money that could have been used to improve the economic conditions on our Reservation.
- The Department should consult with Indian Tribes and implement a meaningful alternative dispute resolution process which would provide a mechanism to resolve dispute before they end up in court.
- Our Tribe has spent significant amount of money on litigation to compel our Trustee to carry out its trust responsibilities. Now is the time to develop another option to address these situations. No Tribe should have to litigate for decades at extreme cost just to get its trustee to carry out its trust duties and responsibilities.

### ***Split Mineral Estates***

- We have another situation involving a split mineral interest. Although the area is located wholly within the exterior boundaries of our Reservation on trust lands and involves the development of trust minerals, the Department of the Interior has suggested that the oil and gas underlying these lands could be leased without our approval or consent merely because the Nation does not hold a majority interest in the mineral estate. We believe this would be a clear breach of the Secretary's trust responsibility owed to us.
- The Department should be required to review and approve leasing instruments in these situations so that our interests are protected. The Department should also be required to obtain our consent before any leasing is allowed to proceed.

### ***Bankruptcy Filings***

- We have also encountered trust responsibility challenges when lessees seek to discharge lease obligations through bankruptcy. Our Trustee must be actively involved in any bankruptcy proceedings from the onset to ensure that any assignment or assumption of tribal oil and gas leases fully complies with Federal and Tribal laws.
- We recommend that the Department develop a coordinated process working with the affected Tribes to respond to these filings. This includes quick coordination and action among the relevant BIA offices, regional Solicitor's Office and U.S. Attorney's Office. The Department should also pursue statutory reforms, if needed, in order to protect the Tribe's mineral resources and leasing authority in these bankruptcy cases. No Tribe should have to litigate, often times, on its own in these forums in order to protect their trust resources.

### ***Water Resources Infrastructure***

- On a final note, I will briefly mention our water infrastructure project. The water system on our Reservation was originally constructed and owned by the BIA. After generations of federal neglect, the water system fell into severe disrepair creating a public health threat to tribal members.
- Working with our Congressional Delegation, we developed a plan to address this problem. Following years of studies and planning, in December 2002, Congress authorized the construction of the \$45 million Jicarilla Apache Rural Water System Project and directed the Secretary to repair and replace the water system infrastructure on our Reservation.
- Nearly ten years later, we have only received about 25% of the funding authorized for our project. We fulfilled all of our obligations for the project and we spent more than \$30 million of our own money. We request that the Department act to remedy this deficiency and fully fund our project and reimburse us for the funds we spend fulfilling the Federal obligations. The Trust Responsibility demands no less.

### **CONCLUSION**

- I happy to answer any questions. Thank you.